UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6

GIANT EAGLE, INC.

and **Case 06-CA-188991**

UNITED FOOD AND COMMERCIAL WORKERS, INTERNATIONAL UNION, LOCAL 23, CLC

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO THE DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE DAVID I. GOLDMAN

Submitted by:

Clifford E. Spungen
Counsel for the General Counsel

NATIONAL LABOR RELATIONS BOARD, Region Six
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222

Dated at Pittsburgh, Pennsylvania,
this 9th day of May, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6

GIANT EAGLE, INC.

and **Case 06-CA-188991**

UNITED FOOD AND COMMERCIAL WORKERS, INTERNATIONAL UNION, LOCAL 23, CLC

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO THE DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE DAVID I. GOLDMAN

I. STATEMENT OF THE CASE

Counsel for the General Counsel hereby files and respectfully requests that the Board consider this Answering Brief in Opposition to Respondent's Exceptions to the Decision and Order of Administrative Law Judge David I. Goldman in the above-captioned matter, which issued on March 14, 2018. Counsel for the General Counsel does not concede or agree to the validity or applicability of any of the statements or arguments made by Respondent in its Exceptions to Administrative Law Judge's Decision and Order ("Respondent's Exceptions"), including those which are not specifically addressed herein. Importantly, these cases presented no factual dispute. The ALJ's Findings of Fact accurately describes the facts underlying the allegations in this case, so, for the most part, they will not be repeated herein.

The Administrative Law Judge ("ALJ") correctly found that Respondent violated Section 8(a)(1) of the Act by, during pre-election "captive audience" meetings with employees, conditioning the preelection disclosure of details about upcoming wage and benefit changes on the employee's seeking and securing a waiver from the Union of the right to file charges or

objections over the preelection disclosure of the evidence; by announcing that it was conditioning consideration of the application of an employee for a promotion on the employees' seeking and securing a waiver from the Union of the right to file charges or objections in the event the employee was granted the promotion; and, following the election, by announcing unilateral changes in retirement changes directly to employees (ALJD, pp. 1, et seq.).[1] The ALJ accurately set forth the statement of the case in the ALJ's Decision.[2]

On April 11, 2018, Respondent filed Respondent's Exceptions, along with a brief in support of Respondent's Exceptions. Examination of Respondent's Exceptions reveals that Respondent has chosen to attack many of the conclusions of law and credibility resolutions reached by the ALJ. Respondent's Exceptions in this regard are, in many instances, a mere repetition of arguments made in Respondent's Brief to the ALJ. Thus, Respondent's arguments and authorities presented in support of its Exceptions have previously been cogently considered and correctly rejected by the ALJ. The ALJ's opinion carefully analyzes appropriate precedent and applies it to the facts.

Counsel for the General Counsel submits this Answering Brief to Respondent's Exceptions pursuant to Section 102.46 of the Board's Rules and Regulations. It is Counsel for the General Counsel's position that the ALJ's Decision was correct as to matters of law and fact, and that the Board should reject the Respondent's Exceptions and instead adopt the ALJ's Decision and Recommended Order in its entirety. Certain statements and arguments advanced in Respondent's Brief[3], however, deserve further comment.

[1] "ALJD, p." refers to the page of the ALJ's Decision; GCX refers to General Counsel's Exhibits; RX refers to Respondent's Exhibits; JX refers to Joint Exhibits; and numbers in parentheses refer to pages of the official trial transcript.

[2] ALJD p. 3-11.

[3] Unless otherwise noted, references herein to "Respondent's Brief" refer to Giant Eagle's Brief in Support of Exceptions to the Administrative Law Judge's Decision and Order, dated March 14, 2018.

II. STATEMENT OF THE ISSUES

Respondent filed 25 separate exceptions to the ALJ's Decision and Order, which it divided into six questions.[4] These questions will be answered as follows:

1. The ALJ did not violate Respondent's due process rights.[5]

2. The ALJ applied the appropriate legal standard in evaluating Respondent's conduct.[6]

3. The ALJ correctly determined that Respondent violated Section 8(a)(1) of the Act by conditioning the preelection disclosure of details about upcoming wage and benefits changes on the employees' seeking and securing a waiver from the Union of the right to file charges or objections over the preelection disclosure of the information.[7]

4. The ALJ correctly determined that Respondent violated Section 8(a)(1) of the Act by announcing that it was conditioning consideration of the application of an employee for a promotion on the employees' seeking and securing a waiver from the Union of the right to file charges or objections in the event the employee was granted the promotion.[8]

5. The ALJ correctly determined that Respondent violated Section 8(a)(1) of the Act by announcing unilateral changes in retirement benefits to employees.[9]

6. The ALJ's Decision preserves Respondent's right to free speech.[10]

III. SUMMARY OF THE ARGUMENT

[4] See Respondent's Brief at p. i.

[5] See Respondent's Exceptions 3, 6, 7, 9, 14-16, 18, 21-23 and 25.

[6] See Respondent's Exceptions 9, 14, 16, 18 and 21-25.

[7] See Respondent's Exceptions 2, 4, 5, 9-12 and 21.

[8] See Respondent's Exceptions 1, 3, 4, 6, 7, 13-18 and 22.

[9] See Respondent's Exceptions 8, 19, 20 and 23

[10] See Respondent's Exceptions 4, 21, 22, 24 and 25.

Respondent's exceptions are erroneous and without merit. Counsel for the General Counsel does not concede to the validity of any arguments made by Respondent in either its exceptions or brief in support of exceptions, including those not specifically referenced herein. To the contrary, Counsel for the General Counsel maintains that the ALJ's Decision, in its entirety, is supported by the clear preponderance of the evidence.

Respondent has filed a number of exceptions which relate to all of the violations of the Act found in the ALJ's Decision. Not each of these exceptions will be addressed individually or specifically. Instead, this Answering Brief broadly responds to these exceptions through general categories, described in the headings and sub-headings below. Many of the ALJ's determinations are based upon his determinations regarding the credibility of the witnesses. As such, his findings should be upheld.[11] The relevant portions of the ALJ's Decision are referenced in each of the subsections below. For the reasons discussed in more detail below, the ALJ's credibility determinations should not be disturbed. To the extent that other exceptions arguably relate to something other than credibility, these exceptions amount nothing more than either convenient misreading or misunderstanding of the ALJ's Decision, or an unwillingness to accept the findings in this case.

Generally, Respondent's exceptions relate to (a) the ALJ's credibility determinations; (b) the ALJ's finding and conclusions that Respondent violated the Act by unlawfully conditioning preelection disclosure of details of upcoming changes to wages and benefits upon its employees' seeking a waiver from the Union; by unlawfully announcing that it was conditioning its consideration of the application of an employee for promotion upon its employees' seeking a waiver from the Union; and by unlawfully a announcing a unilateral change in retirement benefits; (c) the purported violation of Respondent's Due Process and Free Speech rights; (d) the

[11] *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enf'd 188 F.2d 362 (3d Cir. 1951) .

purported failure of the ALJ to apply an objective standard in evaluating Respondent's conduct; and (e) the terms and applicability of the ALJ's recommended order. Each exception should be dismissed.

IV. ARGUMENT

The ALJ correctly concluded that the General Counsel met its burden of proof and concluded that Respondent violated the Act by unlawfully conditioning preelection disclosure of details concerning upcoming changes to wages and benefits upon its employees' seeking a waiver from the Union; by unlawfully announcing that it was conditioning its consideration of the application of an employee for promotion upon its employees' seeking a waiver from the Union; and by unlawfully a announcing a unilateral change in retirement benefits. For each of these violations, the ALJ applied the proper analytical standard, and correctly concluded that Counsel for the General Counsel met its burden of proof.

A. The ALJ's Decision preserves Respondent's due process rights.

Respondent contends that the ALJ made "numerous" findings not raised in the Complaint or supported by the record.[12] It contends that the ALJ made some findings regarding which Respondent had not given the opportunity to fully litigate. In *Enlow Medical Center*, one of only two cases cited by Respondent in support of its due process allegations, the Board reiterated the rule that

> Under well-established precedent, the Board may find a violation not alleged in the complaint, even where the General Counsel has not filed a motion to amend, if the issue is closely related to the subject matter of the complaint and has been fully and fairly litigated.[13]

[12] The relevant exceptions for this matter include 3, 6, 7, 9, 14-16, 18, 21-23 and 25.

[13] *Enlow Medical Center*, 346 NLRB 854 (2006), quoting *Desert Aggregates*, 340 NLRB 289, 292–293 (2003), citing *Williams Pipeline Co*., 315 NLRB 630 (1994); *Pergament United Sales*,296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

Respondent does not contend that any issues found to be violative of the Act were not raised in the Complaint. Rather, its main contention is that the ALJD found a violation of the Act based upon a theory that had not been the "primary" theory raised by Counsel for the General Counsel. In support of this argument, Respondent cites the Board's decision in *In re Sierra Bullets, LLC*, 340 NLRB 242 (2003). Respondent mischaracterizes the finding in that case, summarizing the decision as one in which the Board reversed an "ALJ's finding of a violation on a theory not advanced by the General Counsel because respondent was not given sufficient notice that the issue would be litigated so as to comport with due process."[14] The Board in *Sierra Bullets* did not change the general rule that the Board may identify a violation of the Act based upon a theory not specifically raised by the General Counsel. *Supra* at 243, citing *Louisiana Pacific Corp*., 299 NLRB 16, 18 (1990). Rather, the Board held that the administrative law judge in that matter had found a violation based upon a theory not raised at the hearing, where "General Counsel expressly chose to litigate" a "narrow" theory of the case, and that his "express representations on the record, his conduct in litigating the case, and his arguments on brief to the judge, reasonably led the [r]espondent to believe that it would not have to defend its decision to declare impasse on a different theory." *Supra, at 243,* citing *Paul Mueller Co*., 332 NLRB 1350 (2000).

In the present case, Respondent does not contend that Counsel for the General Counsel expressly limited the theory of the case. Nor does Respondent claim that the ALJ's decision was based upon a theory which was not raised by Counsel for the General Counsel, or argued by Counsel for General Counsel in his brief. Rather, Respondent claims that the ALJ's finding of a violation of Section 8(a)(1) was not based upon Counsel for the General Counsel's "primary"

[14] See Respondent's Brief at p. 10.

theory, so that Respondent was not given an adequate opportunity to present a defense. This argument is nothing short of absurd and must be rejected outright. Respondent was on notice of the violations alleged in the Complaint and any and was obligated to anticipate all theories of the case, and was also given a full and free opportunity to present its evidence and argument.[15]

Respondent's remaining contentions focus on portions of the ALJ's Decision which characterize Respondent's actions in a negative light, to which Respondent has taken apparent offense.[16] The ALJ's observations regarding the election campaign are neither findings of fact nor conclusions of law and did not form the basis of the ALJ's Conclusions of Law.

For the reasons set forth above, Respondent's exceptions 3, 6, 7, 9, 14-16, 18, 21-23 and 25 must be rejected.

B. The ALJ applied the appropriate standard in evaluating Respondent's conduct.

Respondent contends that the ALJ applied the wrong legal standard for violations of Section 8(a)(1) of the Act by considering Respondent's motives in finding merit to the allegations raised in the Complaint. The ALJ's references to motivation provide the context in which the violation arose. Respondent is correct when it states that "[i]n determining whether an employer has engaged in unlawful coercion in violation of Section 8(a)(1) of the Act, the test is whether the disputed statement or conduct would reasonably tend to coerce or interfere with employee rights.[17] The ALJ's conclusions that Respondent violated the Act through its use of

[15] At the hearing, the ALJ gave Respondent ample opportunity to present its rationale for requiring its employees to seek and secure a waiver from the Union before it would provide vital information or process a co-worker's promotion application. In fact, the ALJ was more than generous in allowing Respondent's counsel, over repeated objections, to read into the record, as an opening statement, what essentially was its post-hearing brief. (Transcript p. 10-31).

[16] See Respondent's Brief at p.11.

[17] See Respondent's Brief at p. 13, citing The *Smithfield Packing Company, Inc*., 344 NLRB 1 (2004).

waivers, must, of course, consider the coercive nature of Respondent's actions surrounding its presentation of waivers, which did not occur in a vacuum but in the days leading up to a representation case election. Indeed, the ALJ applied the appropriate legal test, and found that Respondent's use of waivers would "reasonably tend to coerce" based on context. Further, the ALJ correctly concluded, inter alia, that "the problem with Giant Eagle's tactics is the use of waivers to blame the union, to "attribute[e] to the union the onus for the postponement … or disparaging and undermining the union by creating the impression that it stood in the way."[18]

For the reasons set forth above, Respondent's exceptions 9, 14, 16, 18 and 21-25 must be rejected.

C. The ALJ correctly determined that Respondent violated Section 8(a)(1) of the Act by conditioning the preelection disclosure of details about upcoming wage and benefits changes on the employees' seeking and securing a waiver from the Union of the right to file charges or objections over the preelection disclosure of the information.

The ALJ correctly found that Respondent's conditioning preelection disclosure of details of upcoming changes to wages and benefits violated Section 8(a)(1) of the Act.[19] However, Respondent takes exception to this finding on essentially two grounds.[20] First, Respondent takes issue with the ALJ's determination that the withholding of information from employees constituted the withholding of a benefit.[21] Second, Respondent excepts to the ALJ's finding that

[18] ALJD p. 14, citing *Atlantic Forest Products, Inc*., 282 NLRB 855,at 858-859 (1987).

[19] The relevant portion of the ALJ's Decision setting forth the factual findings on this topic is found on pages 4-7.

[20] The relevant exceptions for this matter include 2, 4, 5, 9-12 and 21.

[21] Respondent's Brief p. 14-18.

the employer's conduct in *McCormick Longmeadow Stone*, 158 NLRB 1237 (1966) was "indistinguishable" from Respondent's conduct herein.[22]

As noted previously, the facts are not in dispute. During the weeks leading up to a representation election, the Employer held a series of mandatory "captive audience" meetings. At one of these meetings, held on September 15, 2016, employees requested comparative information about employee benefits in the non-union setting as opposed to those available under the Union's collective bargaining agreement.[23] At the next meeting, on September 21, 2016, Respondent's counsel advised the gathered employees, that he would provide them with the comparative benefit information, as well as information about their annual wage increases, at the next meeting (95-96). Rather than providing the information, however, at the next meeting, held on September 26, 2016, Respondent's counsel distributed waivers to employees and directed them to have the waivers signed by the Union, absent which Respondent would not provide employees with the information they sought (36, 62).

Respondent now argues, without case authority, that the information sought by employees was not a benefit. The ALJ correctly characterized this argument as "sophistry," a plausible but fallacious argument. In fact, Respondent had "insisted to employees (that) having this information would be a benefit for employees" (ALJD p. 14). During the organizing drive, Respondent's counsel emphasized the vital importance of the information and the benefit employees would accrue from its receipt. The waivers themselves emphasized the importance of

[22] Again Respondent selectively quoted the ALJ's decision which stated that *McCormick Longmeadow* was "indistinguishable **in any relevant way** from the instant case…" (emphasis supplied) (ALJD p. 13).

[23] Since the 1950's, Respondent has recognized the Union as the exclusive collective-bargaining representative of its employees at many of its stores, including the one at issue herein, where it represents most of the 417 employees employed there. The seven catering employees involved herein sought also to be represented by the Union (94).

the information sought, stating, in the voice of an employee, "[w]ithout this information, I am unable (to) cast a fully informed vote in the upcoming election" (JX-2 and 3).

Respondent's Counsel effectively shifted the onus of withholding this information onto the Union. He directed employees to explain to the Union that the information was so important that, if the Union refused to sign the waivers, the employees should "explain that you cannot vote for the union" without the information [JX-8(b)]. Three days later, after employees told him that they would not have the Union sign the waiver, Respondent's Counsel accused the Union of "trying to hide stuff" from them (41-42). In his final captive audience meeting, Respondent's Counsel repeatedly emphasized the importance of the information, and again shifted the onus to the Union for employees' not receiving the benefit of the wage and benefit information [JX-8(d)].[24]

The ALJ was also correct in relying upon the Board's decision in *McCormick* for concluding that Respondent had violated Section 8(a)(1) of the Act. In *McCormick*, the Board found, as correctly noted by the ALJ, "that an employer violates Section 8(a)(1) during an election campaign by conditioning the grant of a benefit on the union waiving its right to file objections or charges with the Board where the employer 'directed the employees' attention to the union aspect of the matter . . . by announcing a desire to offer immediate benefits to its employees and then shifting to the Union the onus for not instituting these benefits."[25]

[24] In that final meeting, Respondent's Counsel, over and over again directed employees to focus on the importance of the wage and benefit information and on the Union's refusal to sign a waiver, stating, variously, the following: 1) " the union won't allow you to have the details or a comparison of benefit"; 2)"the 2017 information benefits and costs are critically relevant to how you vote"; 3) "refusing to sign (the waiver) if you request it, is actually an insult to your intelligence"; 4) "refusing to sign the waivers means that the Union will not (honor your choice and your vote"; 5) "Unions sign the waiver if they really stand for giving members a voice"; and 6) "(the union) did not want you to have the relevant information" [JX-8(d)].

[25] ALJD at 13 quoting *McCormick*, 158 NLRB at 1237, 1242-1243.

The employer in *McCormick* sent a letter to its employees and to the union, asking the union to waive its right to file a grievance if the employer provided a benefit to employees. The Board found that in so doing, the employer shifted the onus of its own failure to provide that benefit onto the union, saying "that it would be unfair and unfortunate for the employees to be deprived of these benefits" and if the waiver was not given, the employees would be deprived of these benefits. *McCormick*, supra at 1238. The Board found that "through this conduct, Respondent sought to discredit the Union and discourage membership therein by announcing a desire to offer immediate benefits to its employees and then shifting to the Union the onus for not instituting these benefits" Id. The same principle applies to this case.

In the present matter, Respondent's admonishments were far harsher than those of the employer in *McCormick*. The employer in *McCormick* sent its request for the union to sign a waiver both to employees and to the union. Here, Respondent did not ask the Union directly to sign a waiver despite the more than 50-year collective-bargaining relationship between the parties. This was true even though Union representatives were in the building on the very days when Respondent held mandatory "captive audience meetings" (52). In short, Respondent unnecessarily used the employees as a middle man. In doing so, it "'directed the employees' attention to the union aspect of the matter" in violation of Section 8(a)(1) of the Act.

For the reasons set forth above, Respondent's exceptions 2, 4, 5, 9-12 and 21 must be rejected.

D. <u>The ALJ correctly determined that Respondent violated Section 8(a)(1) of the Act by conditioning the consideration of the application of an employee for a promotion on the employees' seeking and securing a waiver from the Union of the right to file charges or objections in the event the employee was granted the promotion.</u>

Once again, the facts underlying this allegation are not in dispute.[26] At the captive audience meeting held on September 29, 2016, Respondent announced that Kelli Murphy, an employee in the petitioned-for unit, had applied for a supervisory position in another store owned by Respondent. As with the wage and health benefit information waivers, Respondent's Counsel emphasized to the employees how important it was for Respondent to interview Murphy, even referring to her as the "best" or "lead" candidate despite her not having been interviewed or even contacted in the three weeks since she had applied (39, 62-65). Respondent handed waivers to the employees, directed them to give to the waivers to the Union, and told them that Respondent would not interview Murphy unless the employees caused the Union to sign the waivers (39).

The ALJ correctly found that Respondent had again employed the use of waivers coercively when it conditioned interviewing Kelly Murphy for a promotion upon employees' obtaining a waiver from the Union (ALJD at 15, FN 10). The ALJ appropriately noted that Respondent's use of waivers here, was, "a discriminatory approach to job promotions that obviously would have a reasonable tendency to interfere with employee rights" (ALJD p.16). Respondent contends that the ALJ failed to present a legal basis for this decision.[27] That is incorrect. The ALJ's analysis of Respondent's use of waivers, as discussed above, is the same, whether it is applied to the wage and benefit information waiver or to the Murphy interview waiver. The ALJ's ultimate conclusions of the law were identical. In both situations, the ALJ correctly found the use of waivers to be coercive.

[26] Respondent contends that this finding was contrary to the evidence presented inasmuch as Respondent ultimately proceeded with Murphy's application (Exception 1). That fact is not in dispute. The ALJ correctly found that while Respondent ultimately "backed down from this threat of discriminatory treatment of Murphy," it did not do so until after Murphy withdrew her application (ALJD at 16). Respondent's feeble attempt to ameliorate its coercive action did not, as the ALJ correctly noted, "meet the requirements for repudiation of unlawful conduct required for remediation" (ALJD at 16, fn 11, citing *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

[27] The relevant exceptions for this matter include 1, 3, 4, 6, 7, 13-18 and 22.

Respondent's exceptions to the ALJ's conclusions of law are without factual or legal basis and, as such, Respondent's exceptions 1, 3, 4, 6, 7, 13-18 and 22 must be rejected outright.

E. The ALJ correctly determined that Respondent violated Section 8(a)(1) of the Act by announcing unilateral changes in retirement benefits to employees.

The facts, again, are not in dispute. Three weeks after the Union was certified as the exclusive collective-bargaining agent of the unit, Respondent sent letters to unit members announcing that their pensions would be frozen (JX-9 ¶11). It also sent the same letter to thousands of unrepresented employees. It is undisputed that Respondent failed to inform the Union of this significant change until another month had passed (JX-9 ¶12). The ALJ correctly noted in his Decision that the materials sent to the employees, including the unit employees, did not indicate that Respondent had decided to freeze pensions before the Union's representation petition was filed. [28] Respondent excepts to the ALJ's findings.[29]

Respondent first contends that the ALJ failed to note that the materials presented to employees specified that the changes also applied to all non-union employees and did not impact retirees.[30] However, the ALJ did clearly observe that Respondent's mailing "appear(ed) to be a standard letter distributed broadly to nonunion employees" and made "no reference to the unit employees specifically" (ALJD p. 11). To Respondent's consternation, the ALJ found that "there was nothing in the materials from which an employee could reasonably discern that this announcement of a massive unilateral change to retirement benefits was not in derogation of or

[28] The relevant portion of the ALJ's Decision setting forth the factual findings and legal analysis on this topic is found on pages 11 and 17.

[29] The relevant exceptions for this matter include 8, 19, 20 and 23.

[30] See Respondent's Exception 8.

even retaliation for the recent decision of employees" to elect the Union to represent them (ALJD p. 17).

In reaching the conclusion that Respondent's violated the Act, the ALJ correctly cited Board precedent stating that the announcement to represented employees of unilateral changes to their benefits can independently violate Section 8(a)(1). *The Finley Hospital*, 362 NLRB No. 102, slip op. at 5 (2016). The ALJ further noted that the Board does not consider the motivation behind, or the actual impact of, the pronouncement. Rather the Board considers "whether the employer's actions would tend to coerce a reasonable employee." The ALJ stated that "the timing and significance of this announcement of a unilateral change in a core employee benefit – one that employees would reasonably expect would have to be bargained with the Union" would have the tendency to coerce a reasonable employee (ALJD p. 17). This is particularly true immediately following a representation election. The Board "has long recognized that a newly certified union needs a year to establish itself in the eyes of the employees it represents." *Vincent Industrial Plastics, Inc.*, 336 NLRB 697 (2001), citing *Centr-O-Cast & Engineering Co*., 100 NLRB 1507, 1508 (1952).

Respondent's announcement of the pension benefit change, without informing the Union of the change until far later, compounded the difficulties faced by the newly-certified bargaining unit. Respondent contends that it cured the violation when it provided the Union with notice and an opportunity to bargain a month later.[31] However, the Complaint did not allege, and the ALJ did not find, that Respondent had bargained in bad faith in violation of Section 8(a)(5) of the

[31] See Respondent's brief at 17, citing *Raybestos-Manhattan, Inc*., 168 NLRB 396 (1967) for the proposition that a "technical violation of Section 8(a)(5) was later cured when the union was thereafter given the opportunity to bargain on that issue." However, as discussed earlier, regarding Respondent's discriminatory treatment of Murphy, Respondent did not meet the requirements for repudiating its unlawful conduct. *Passavant Memorial Area Hospital*, supra.

Act. Rather, the ALJ was correct in finding that Respondent's announcement of unilateral changes independently violated Section 8(a)(1) of the Act.

For the reasons set forth above, Respondent's exceptions 8, 19, 20 and 23 must be rejected.

F. The ALJ's Decision preserves Respondent's right to free speech.

Respondent contends that the ALJ "eviscerated" Respondent's free speech rights when he "admonished Giant Eagle for 'attacking' and 'criticizing' the Union."[32] Respondent does not take exception to the "formulation of the law, as cited by the ALJ," which it concedes "has its basis in well-settled Board precedent.[33] Rather, in its exceptions, Respondent points only to the ALJ's characterization of statements made by Respondent's counsel on September 26, 2016.[34] Respondent is wrong as to both the facts and the law.

Respondent claims that the ALJ made a legal conclusion that Respondent violated the Act by denigrating the Union. In reality, however, the ALJ made no specific finding concerning Respondent's speech. Rather he found, as alleged in the Complaint, that the use of waivers was coercive. But even if he had made such a finding, Respondent's comments were not protected. It is well established that Section 8(c) of the Act gives employers certain protections, but that it does not give employers carte blanche to make comments which threaten employees or impinge on employees' Section 7 rights. *J&J Snack Foods Handhelds Corp.*, 363 NLRB No. 21, at p. 14 (2015), citing *Children's Center for Behavioral Development*, 347 NLRB 35 (2006).[35]

[32] See Respondent's Brief at 23-24.

[33] Respondent's Brief at 15.

[34] The relevant exceptions for this matter include 4, 21, 22, 24 and 25.

[35] In *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 617 (1969) the U.S. Supreme Court stated:

> [A]ny balancing of the employer rights of free speech and the rights of employees to be free from coercion, restraint, and interference must take into account the economic dependence of the

The Board has long held that speech by an employer which denigrates a union may violate the Act.[36] In *Regency House of Wallingford, Inc*., 356 NLRB 563 (2011), the Board upheld the judge's finding that the employer violated Section 8(a)(1) of the Act when, after the employer had illegally granted wage increases only to junior employees, the employer, inter alia, "repeatedly criticized the Union's rescission demand, impugned the Union's representational abilities, and questioned the Union's good faith toward unit members. *Supra*, at 567. Moreover, the Board in *Wallingford* found that the employer had "put the onus on the Union for the rescission remedy and unlawfully delayed compliance with the Union's employee-approved request for rescission of the increase" *Id*. Here, as in *Wallingford*, Respondent's speech "did not occur in a vacuum" Id. Rather, when combined with the act of seeking a waiver, thereby putting the onus on the Union, Respondent's speech became coercive and unprotected.[37]

For the reasons set forth above, Respondent's exceptions 4, 21, 22, 24 and 25 must be rejected.

V. CONCLUSION AND REQUESTED REMEDY

It is respectfully submitted that the record evidence amply supports all of the conclusions of law made by the ALJ to which Respondent takes exception, and requires a finding that Respondent violated Sections 8(a)(1) of the Act in the manner alleged. Counsel for the General Counsel respectfully requests that the Board adopt the recommendation of the ALJ and issue an order requiring Respondent to post an

---

> employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

[36] See e.g., *J&J Snack Foods Handhelds Corp*., supra.; *Marine World USA*, 236 NLRB 89 (1978); cf. *United Aircraft Corp*., 199 NLRB 658 (1972).

[37] "In those circumstances, we agree completely with the judge that the Respondent's conduct unlawfully denigrated the Union and conveyed that continued union representation would be futile." *Wallingford*, supra, at 567, citing *Billion Oldsmobile-Toyota*, 260 NLRB 745, 754 (1982),.

appropriate Notice to Employees to remedy all of its unlawful conduct and to take any other action deemed proper by the Board to fully remedy Respondent's unlawful conduct.

Dated at Pittsburgh, Pennsylvania, this 9th day of May, 2018.

Respectfully submitted,

/s/ Clifford E. Spungen

Clifford E. Spungen
Counsel for the General Counsel

NATIONAL LABOR RELATIONS BOARD
Region Six
1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222